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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re MITCHELL P., JR., et al., Persons Coming
Under the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

MITCHELL P.,

Defendant and Appellant.

F049469

(Super. Ct. Nos. JD108072,
JD108073 & JD108682)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Robert
Anspach, Judge.

Lawrence E. Fluharty, under appointment by the Court of Appeal, for Defendant
and Appellant.

B. C. Barmann, Sr., County Counsel, and Jennifer E. Zahry, Deputy County
Counsel, for Plaintiff and Respondent.

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The juvenile court sustained petitions with allegations pursuant to section 300, subdivisions (a) and (b) of the Welfare and Institutions Code¹ as to Mitchell P., Jr., and L.P., and pursuant to section 300, subdivisions (b) and (i) as to Jasmine P. Mitchell P. (father) asserts there was insufficient evidence to support the section 300, subdivision (i) jurisdictional finding. He also contends there was insufficient evidence to support the dispositional order removing the children from his custody. Finally, father contends the juvenile court abused its discretion in ordering supervised visitation with his children. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2005, the Department of Human Services (Department) received a referral alleging physical abuse and general neglect of five-year-old Jasmine. Earlier that day, father, a staff sergeant in the military, called 911 to report an injury to Jasmine's arm that had occurred while she was home with her stepmother, Nicole. Paramedics from the military base where the family lived transported Jasmine to the hospital by ambulance.

Hospital X-rays showed a spiral fracture to Jasmine's right arm. There were a number of bruises on Jasmine's face, neck, nasal bridge, above her eyes, and on her back in various stages of healing. Further X-rays were taken, revealing a nondisplaced skull fracture of unknown age. As a result of the injuries, the Department placed Jasmine and her younger brother, one-year-old Mitchell, Jr., into protective custody.

Two days later, the Department filed separate section 300 petitions to remove Jasmine and Mitchell, Jr. from their parents. The petitions both alleged that Jasmine and Mitchell, Jr. were at risk of serious physical harm as a result of father's failure to protect the children from injuries caused by Nicole. (§ 300, subd. (b).) The petitions alleged father did not believe Jasmine's injuries were inflicted, but were, instead, the result of accidents and injuries received while playing. Mitchell, Jr.'s petition also alleged that he

¹All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

was at risk of serious physical harm due to nonaccidental injuries inflicted on Jasmine by Nicole. (§ 300, subd. (a).) Jasmine's petition further alleged that she had been subjected to an act or acts of cruelty by a household member and that her father had failed to protect her from these acts, noting her broken arm, nondisplaced skull fracture, numerous bruises on her back, buttocks, arms, and face, and blisters on her fingertips.

The social study, prepared in anticipation of the August 15, 2005, detentional hearing, stated that an emergency room nurse who first saw Jasmine noticed "bruises all over her face." When Nicole was asked what had happened, she stated that Jasmine fell out of a chair a week earlier. Later, Nicole explained that Jasmine was eating, and when she started to throw up, Nicole grabbed her by the arm to take her to the bathroom, and Jasmine fell off the chair face first. Nicole said that Jasmine had vomited "every so often about 10 or 15 times," but they had not taken her to the doctor as yet.

Father blamed some of the bruising on the fact that the family had a big dog and that Jasmine always played with the dog. Neither Nicole nor father could otherwise account for the bruises on Jasmine's abdomen, both knees, and the left side of her neck and jaw line. Father explained that Nicole punishes Jasmine when she lies, does not listen, or when she "just sits there and pukes," explaining that "Nicole is tired of cleaning up puke." When asked further about the vomiting incidents, father stated that they began in June, but when they took Jasmine to the doctor at the end of July, he told them it was "ok and nothing major."

Nicole explained Jasmine's arm injury as having occurred when the two were playing in the bathroom. According to Nicole, she took Jasmine's arm, put it behind her back, and heard a "pop." Nicole then quickly stated, "[N]ever done that before." When Jasmine was asked what had happened to her arm, she stated that "mommy got mad at me. She gets mad at me all the time, but never this bad." Later, when again asked to explain how her arm was injured, Jasmine took the stuffed animal she was holding, twisted the arm and bent it backwards. When the physician asked Jasmine if she thought she was playing with Nicole at the time, Jasmine stated that she did not know they were

playing until Nicole told her they were playing. Jasmine said that she was worried about Nicole getting into trouble. Jasmine explained that Nicole gets angry with her when she lies and when she vomits. The X-ray of the arm revealed a spiral fracture that looked “sharp and jagged.” The physician ordered additional X-rays, which revealed a nondisplaced skull fracture. Another physician at the hospital reviewed the X-rays and opined that the skull fracture was a sign of “battered child syndrome.”

While Jasmine was being treated, Nicole was described as showing “no emotion” and having a “flat affect,” while father appeared “upset” and “concerned and teary-eyed.” Father stated he had just gained custody of Jasmine from his mother four months earlier. Jasmine had been removed from her biological mother’s custody and placed with her paternal grandmother while father was in Korea for two years.

Mitchell, Jr. was examined and found to have “Mongolian spots” and age-appropriate bruising on his shins. He appeared well-dressed and healthy.

At the detention hearing, father asked that the children remain in his care while Nicole lived elsewhere. Counsel for the minors argued that more information was needed on father’s role in Jasmine’s injuries before either child be allowed to return to the home. The trial court agreed and ordered Jasmine and Mitchell, Jr. detained from the custody of their parents. Reunification services were ordered to begin as soon as possible. Father was allowed weekly, two-hour supervised visits. Nicole was to have no contact with Jasmine.

The combined jurisdictional and dispositional hearing was rescheduled for November 7, 2005. In the meantime, Nicole gave birth to L. in October 2005. Due to the preexisting allegations of abuse, L. was placed into protective custody at birth. A dependency petition was filed pursuant to section 300, subdivisions (a) and (b), alleging L. was at risk of harm due to the injuries Nicole inflicted upon Jasmine and father’s inability to protect the child. L. was detained and the jurisdictional/dispositional hearing also was scheduled for November 7, 2005.

At the combined jurisdictional/dispositional hearing for all three children, the social worker's report filed in anticipation of the hearing included the information contained in the prior social study. The social worker reported that, while father appeared to love Jasmine, he made "no indication that it is even possible that his wife could have caused the injuries to his child." The social worker also reported that father refused to provide information about his parents, who had legal guardianship of Jasmine in the past, and "should be considered for placement." The report included 41 photographs of the bruising on Jasmine's body and the statements of eight health professionals who observed Jasmine's bruising, the fractured arm, and the interaction between Jasmine and Nicole.

The supplemental social study included a letter from Jasmine's paternal grandparents expressing their concern for Jasmine's safety and well-being. It also included an interview with Jasmine conducted on October 4, 2005, in which Jasmine stated that, when she threw up at the table, Nicole "slam[med] me down on the floor," and in another incident, pulled her by her feet and slammed her head against the floor numerous times.

During the jurisdictional phase of the hearing, father called a social worker from the Department to testify about the factual basis of the allegations in the petition. The social worker admitted that the skull fracture suffered by Jasmine was not dated and there was no way to determine when it had occurred. The social worker admitted that it could have happened before Jasmine was placed into her father's care. Based upon the social worker's testimony and the social studies submitted by the Department, the trial court found the allegations of the petitions to be true, with the exception of the allegations relating to the skull fracture and the blisters on Jasmine's hands. Jasmine was adjudged a dependent of the court pursuant to section 300, subdivisions (b) and (i), and Mitchell, Jr. and L. were found to be dependents of the court pursuant to section 300, subdivisions (a) and (b).

During the dispositional phase of the hearing, father testified that he believed Jasmine was injured by Nicole, but that it was not intentional. Instead, father thought the injuries could have occurred in the “different ways that she was disciplined” or during “play that was a little too rough.” Father explained that he thought Nicole was “overwhelmed” by the addition of Jasmine into the household, and opined that he should have “got her some help, maybe put her in day care or put her in a pre-kindergarten program.” Father testified that he did not believe Jasmine’s version of the “chair incident,” claiming there was no way Nicole, then five or six months pregnant, could have grabbed Jasmine by the feet. He claimed that Jasmine had a tendency to lie and to “make up things.” Father did not object to Nicole visiting Jasmine because he claimed Jasmine had expressed a desire to see her. Father testified that he wished to reunify the family once Nicole completed counseling. Based upon the evidence and testimony presented, the trial court found out-of-home placement appropriate and necessary, and granted family reunification services and supervised visitation.

On April 10, 2006, after father filed the current appeal, Mitchell, Jr. and L. were returned to the custody of father and Nicole with family maintenance services.

DISCUSSION

1. Jurisdictional Findings

As set out above, at the conclusion of the contested jurisdictional hearing, the juvenile court sustained two allegations regarding Jasmine. First, the juvenile court found that Jasmine came within the provisions of subdivision (b) of section 300 because she had suffered numerous injuries, including a spiral fracture to her arm and bruises to many parts of her body, as a result of father’s inability to adequately supervise or protect her from Nicole. The juvenile court also found true the allegations under subdivision (i) of section 300 that Jasmine had been subjected to an act or acts of cruelty by Nicole, namely the spiral fracture and the many bruises to her body, and that father had failed to adequately protect her from these acts when he knew or reasonably should have known Jasmine was in danger. As to the latter finding, father does not dispute that Jasmine was

injured by Nicole. Instead, he argues that the incidents did not fit the definition of “an act ... of cruelty” under section 300, subdivision (i). He also contends there was insufficient evidence that he knew or should have known that Jasmine was in danger of being subjected to an act or acts of cruelty.

We first address father’s claim that the incidents to which Jasmine was subjected were not “acts of cruelty.” Because this issue is one solely of statutory interpretation, our review is de novo. (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.)

Under section 300, subdivision (i), a minor may be adjudged a dependent child if he or she “has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household.” The term “cruelty” is not defined in section 300, subdivision (i). Neither party has cited any case law in which that term, as employed in section 300, subdivision (i), has been defined, nor has our research led us to any case in which the term has been defined.

In order to assist us further in understanding what constitutes “cruelty” under section 300, subdivision (i), we turn to established definitions of the term. Black’s Law Dictionary defines “cruelty” as “intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage.” (Black’s Law Dict. (8th ed. 2004) p. 405.) Webster’s defines “cruelty” as “1. the quality or condition of being cruel; inhumanity; hardheartedness. 2. ... a cruel action, remark, etc. 3. ... willful mistreatment seriously harmful to life or to physical or mental health[.]” (Webster’s New World Dict. (2d ed. 1982) p. 341.) “Cruel,” in turn, is defined as “1. deliberately seeking to inflict pain and suffering; enjoying others’ suffering; without mercy or pity. 2. causing, or of a kind to cause, pain, distress, etc.” (*Id.* at pp. 340-341.)

Father does cite to *In re Benjamin D.* (1991) 227 Cal.App.3d 1464, in which the court found sufficient evidence of an act or acts of cruelty, pursuant to section 300, subdivision (i). Without defining the term, the court found the following acts by the father sufficient to establish that the child was subject to an act or acts of cruelty: (1) the

father repeatedly pinched the two-year-old child on the stomach and arms, severely enough to leave visible impressions for days; (2) within days of the child's birth, the father took the family to the park, but would not allow the mother to cover the child, although the weather was cold and windy; (3) the father poured a packet of hot sauce into the newborn's mouth at a local fast food restaurant; (4) during the first nine months of the baby's life, he slept on the floor because the father did not want to buy him a crib; (5) the father would frequently throw the baby into the air, usually hurting him in the process; and (6) the father also held the baby under a cold shower to stop his crying or when he soiled his diaper. (*In re Benjamin D.*, *supra*, at pp. 1466-1467.)

Father here contends *Benjamin D.* is distinguishable in that "there were no similar examples of cruel behavior." While the acts here—pulling Jasmine off of a chair when she started to vomit, causing her head to hit the ground; forcing her arm behind her back, causing it to fracture—occurred less frequently than the acts chronicled in *Benjamin D.*, they may be just as "cruel."

We also note this court's opinion in *In re Rebekah R.* (1994) 27 Cal.App.4th 1638 in which jurisdiction of the minor was found under multiple subdivisions of section 300, including subdivision (i), but jurisdiction was not questioned on appeal. The minor in *Rebekah R.* suffered bruises and multiple fractures plus healing fractures, each of which had to have been caused by separate wrenching actions. (*In re Rebekah R.*, at p. 1642.)

In *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, the juvenile court found the child came within numerous provisions of section 300, including subdivision (i). The acts that were found to be cruel included: (1) the mother confined the child to his room for prolonged periods of time; (2) the mother allowed the child to sit in his own waste for extended periods of time; (3) the mother tied the child's ankles and wrists together to restrain him and put a sock in his mouth to prevent him from screaming; (4) the mother confined the child to a darkened closet for extended periods of time; and (5) the mother confined the child to his crib by placing a board across the top and then

jabbing him with a screwdriver through the crib's slats. (*Deborah S. v. Superior Court*, at p. 746.) Jurisdiction, however, was not at issue on appeal. (*Id.* at p. 744.)

These cases, while not defining “an act or acts of cruelty” per se, demonstrate that acts of cruelty, within the meaning of section 300, subdivision (i), entail harmful acts that were purposefully done in order to inflict either physical or mental harm to the child.

Here, the Department's prehearing report stated that Jasmine “had been subjected to acts of cruelty at the hands of her stepmother.” Several factors support this conclusion. While Jasmine did not testify, she told various social workers and health care professionals that she experienced pain when Nicole pulled her from the chair and slammed her on the floor when she began to vomit. Jasmine described her head as “getting dizzy.” She described another incident in which Nicole grabbed her by the feet and slammed her head on the floor repeatedly. She also spoke of the pain inflicted by Nicole when she “twisted ... and twisted” her arm, and Jasmine heard it “pop.” The physical injuries to Jasmine were obvious—an X-ray showed the broken arm, described as “sharp and jagged,” and the bruises on her face and body were numerous. The paramedic responding to the scene opined that “it would take a good amount of force to fracture a child's bone since they are more pliable.” In sum, the evidence supports the conclusion that pulling Jasmine off the chair, causing her to hit her head on the ground, and twisting her arm, causing it to break, constitute an “act or acts of cruelty,” as defined in the statute.

Father also contends that there was no way he knew or reasonably could have known Jasmine was at risk of any acts of cruelty because she never told him that Nicole was hurting her. We disagree.

At the jurisdictional hearing, the court must find by a preponderance of the evidence that the minor is a person described in section 300. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) As this court explained in *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379, in juvenile dependency cases, the power of the appellant court asked to assess the sufficiency of the

evidence begins and ends with a determination as to whether there is any substantial evidence, contradicted or not, that will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the decision, if possible. We may not reweigh or express an independent judgment on the evidence. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) In this regard, issues of fact and credibility are matters for the trial court alone. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.)

As relevant to father's argument, section 300, subdivision (i) provides, in the alternative, that a minor may be adjudged a dependent child, if "the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty."

While father may not have observed Nicole physically harm Jasmine, he reasonably knew or should have known that she was being injured by Nicole's actions. Even before Jasmine's arm was broken, there were obvious signs that she had been repeatedly injured. At the time paramedics responded to the call about Jasmine's broken arm, one of the paramedics reported that the bruising around her left eye and on the bridge of her nose was "pretty serious," and she wondered why the family had called 911 for an arm injury and not "for a face with such extensive bruising." The emergency room nurse who first saw Jasmine "noticed bruises all over her face." Two other nurses and a physician who attended Jasmine also observed "obvious bruising" over her eye and bruising on her head, nose, and back. While father testified that he did not think Nicole intentionally hurt Jasmine, he acknowledged that he knew Jasmine had been injured when Nicole pulled her out of her chair, and he knew Nicole may have been overwhelmed by the responsibilities in taking care of Jasmine.

The evidence supports the conclusion that father knew or reasonably should have known that Jasmine was at risk of an act or acts of cruelty.

2. Dispositional Findings

In addition to challenging the jurisdictional findings, father also attacks the dispositional order removing all three children from his custody. Father contends that, since he was not the abuser and since Nicole was out of the house, the children could have safely remained in the house with him.

The Department addresses the issue only to the extent that it claims the dispositional portion of father's appeal as it relates to Mitchell, Jr. and L. became moot when the court returned the two children to parental custody at the April 10, 2006, review hearing. The Department claims an appeal is moot when the controversy no longer exists, citing inter alia to *In re Dani R.* (2001) 89 Cal.App.4th 402. But in *Dani R.*, the parents subsequently stipulated in the trial court to the facts contested on appeal, rendering the issue moot. (*Id.* at pp. 405-406.) Here, father continues to challenge facts underlying the dispositional findings and order.

In addition, "when an issue raised in a timely notice of appeal continues to affect the rights of the child or the parents, the appeal is not necessarily rendered moot by the dismissal of the underlying dependency proceedings." (*In re Hirenia C.* (1993) 18 Cal.App.4th 504, 517-518.) Accordingly, "the question of mootness must be decided on a case-by-case basis." (*Id.* at p. 518.) Mitchell, Jr. and L. were returned to father's custody; but dependency jurisdiction was not dismissed. Were Mitchell, Jr. and L. to be removed from father's custody a second time, their detention during the first six months of the case would continue to affect father's rights. (See § 361.5, subd. (a)(2) [limiting reunification services to six months when child is under the age of three and no substantial progress is made].) Father's appeal is therefore still viable as the issue relates to all three of his children, and we address his contention on the merits.

To remove a child from the parent's custody, section 361 requires a finding, by clear and convincing evidence, of one of the following circumstances: (1) substantial danger to the physical or emotional well-being of the child (or would be if the child were returned home); (2) the parent is unwilling to have physical custody; (3) the child is

suffering severe emotional damage; (4) the child (or a sibling) has been sexually abused; or (5) the child has been left without provision for support. (§ 361, subd. (c)(1)-(5).) The relevant provision here is the first, that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” (§ 361, subd. (c)(1).)

In reviewing the sufficiency of the evidence to support the dispositional finding, we employ the same standard of review enunciated above. (*In re Brison C.*, *supra*, 81 Cal.App.4th at pp. 1378-1379.) Also, we note that the juvenile court has broad discretion to fashion a dispositional order in accordance with the child’s best interests. The court’s dispositional order will not be disturbed absent a clear abuse of that discretion. (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1227.)

There is a close overlap between a finding of jurisdiction based on a substantial risk of serious physical harm or illness under section 300, subdivision (b) and a removal finding at disposition based on a substantial danger to the physical health, safety, and protection of the child under section 361, subdivision (c)(1). (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 826.) As stated earlier in this opinion, father did not contest the court’s jurisdictional findings under section 300, subdivision (b), alleging that there would be a substantial danger to Jasmine, Mitchell, Jr., and L.’s physical health, safety and protection were they returned to his custody. But father argues that the court abused its discretion when it did not accept his reasonable alternative to removal. (§ 361, subd. (c)(1).) We disagree.

At the dispositional hearing, father testified that he was living by himself and that Nicole was residing with her sister, but his intent was to live as husband and wife once the two of them completed all of their classes. But while father acknowledged that it was Nicole who hurt Jasmine, he clarified that “it wasn’t intentional.” Rather, father described it as “different ways that she was disciplined,” although the discipline may not

have been appropriate. Father described the incidents as “too rough,” but again stated “it wasn’t intentional.” Father opined that Nicole may have been “overwhelmed” when Jasmine joined the family, and that maybe he should have stepped in to get her some help or put the children into daycare.

Father testified that he hoped Nicole would complete her programs and, eventually, return home. Father testified that if the children were returned to him, he already had daycare arrangements and Jasmine had already started kindergarten. Father attended all visitations, except one, and was in weekly counseling sessions. Father testified that Jasmine had expressed a desire to see Nicole, in contradiction to the social worker’s testimony that Jasmine was “scared of her stepmom,” and father had no objection to the two seeing each other.

When asked about the incident in which Jasmine was grabbed from the chair and fell onto the ground, he again said he did not think Nicole “did it intentionally,” but “[s]he might have probably been a little too rough maybe.” He also described the incident when Jasmine’s arm was broken as “play that was a little too rough.” Father testified that he discussed the allegations of physical abuse with Nicole, and she had told him that “she was a little too rough.” Father disbelieved Jasmine’s account that Nicole pulled her out of the chair by the feet, saying Jasmine had a tendency to make things up and to lie.

The record does not support father’s claim that placing the children with him was a reasonable means to protect them. While father was making what the court described as “moderate progress toward alleviating or mitigating the causes for out-of-home placement,” he still had not acknowledged that Nicole had abused Jasmine, instead minimizing her actions as discipline or play that was “a little too rough.” “[D]enial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision.” (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.) Father also tended to dismiss Jasmine’s account of the events and to

minimize her concerns. Father's primary concern appeared to be the preservation of his relationship with Nicole, not his children.

Because of the serious nature of the injuries suffered by Jasmine, and father's failure to acknowledge them, the court did not abuse its discretion in concluding that placing the children with father was not a reasonable alternative.

3. Supervised Visitation

Finally, father contends that the trial court abused its discretion when it ordered that he have only supervised contact with his children, because he never mistreated or abused them. Department contends, and we agree, that this issue as to Mitchell, Jr. and L. is moot in light of the fact that they have been returned to father's custody. When the court is left without the ability "to fashion an effective remedy," the appeal is moot and should be dismissed. (See, e.g., *In re Pablo D.* (1998) 67 Cal.App.4th 759, 761 [cannot rescind services already received]; *In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158 [cannot complain after the fact about scheduling of review hearing].) We will therefore address father's concern only as it relates to Jasmine.

The juvenile court has the power and responsibility to regulate visitation between a dependent child and his or her parent. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1373.) When examining what type of visitation is appropriate, the court focuses on the best interests of the child. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50.) The frequency, duration, and nature of the visits are subject to the court's sound discretion.

(*Guardianship of Kaylee J.* (1997) 55 Cal.App.4th 1425, 1432.)

While father may not have personally mistreated or injured Jasmine, he was responsible for failing to protect her from Nicole. Even after the severity of the injuries to Jasmine was made known to father by the medical staff, he steadfastly refused to believe that Nicole intentionally harmed her, dismissing her actions as "rough play." Father also stated that he had no objection to Jasmine visiting with Nicole, although Nicole was ordered to have no contact with Jasmine, and Jasmine herself had stated that

she was “scared” of Nicole. Father also failed to believe or give much credibility to Jasmine’s account of the events.

In light of this evidence, it cannot be said that the court abused its discretion in ordering supervised visits between Jasmine and her father.

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

DAWSON, J.

WE CONCUR:

GOMES, Acting P.J.

HILL, J.